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DEFINITION AND NATURE OF LAW

The object of the first article is to discuss the nature, definition and origin of law in order that we may have as clear an idea as possible on that point before undertaking to investigate international law. As we shall see, there are a number of possible conceptions of what law is. The writers generally fail to distinguish these different conceptions and to recognize that it is impossible to understand international law if we cling to one of them, to the exclusion of the others.[1]

The discussion will be based upon the assumption that law, whatever it is, has something to do with human conduct, whatever other objects it may have to do with also, and this assumption will furthermore be narrowed in its scope by excluding everything with which the law may have to do except human conduct, as, for instance, the operations of nature. The first inquiry, therefore, is as to human conduct.

The word "conduct" is usually confined to acts of human beings and may be defined as an adjustment of acts to ends. Conduct exhibits itself to man as a fact, and the philosophy of law is concerned with the proper jural conception of the external aspect of that conduct. The philosophy of ethics excludes conduct without purpose, but the jural conception includes that which is apparently conduct, even though it is not conduct in the ethical sense. The attention of the legal philosopher is directed to the acts of

 Substantially Chapter One of a treatise on International Law in course of publication. Section Numbers, headings and cross references omitted.

[1] The first chapter is somewhat brief and fragmentary, but is believed to be sufficient to indicate the conception of law upon which the discussion is based. The pure philosophy of the law deserves a separate treatise, and this short summary is only necessary because of the inextricable confusion in the writers, which makes it impossible to find any clear proposition as a starting point.

human beings which are externally apparent and to certain factors determining those acts. We must also remember that the factors determining conduct are restraints on conduct, generally restraints on the operation of the factors of self interest, and instinct. The first great distinction, therefore, is between restrained and unrestrained conduct, and we do not enter the region of law until we reach the limits of restrained conduct. Our first inquiry, therefore, is as to conduct as a fact, which is the background of the discussion. Our next step is to consider the restraints on that conduct, their classification, description and operation. Then we shall be in a position to consider the meaning of the word "law."

Since conduct revolves around interests, it is important to understand what we mean by an interest before pursuing the inquiry into the factors which determine conduct. I have an interest in an object when I will be affected in any way by any change in that object, whether that change is produced by an outside agency or occurs in the object itself. This interest may vary in intensity from mere idle curiosity to absorption of my entire welfare. The principal object in which man is interested is himself, and self-interest is therefore the greatest interest in the world. The number of possible interests for an individual in any community will be determined by the economic development and civilization of that community.[2] As the objects which existed in primitive life were few, and the intellectual and ethical development of the members of the community was limited, the number of interests which actually existed was small compared to the diversity which may be enumerated in a modern civilized community. My interest in an object may be affected by (A) a change in my attitude toward the object, (B) a change in the object itself, (C) the action of some outside agency.[3] Since we

[2]The number of interests in a community will correspond to (*a*) the variety of objects which exist in the community, (*b*) the variety of objects outside to which the community has assumed some relation, (*c*) the intellectual and ethical development of the members of the community. There are more possible interests in New York and London than there are in Patagonia or Thibet.

[3]My interest in an—
Inanimate object will be affected by
The forces of nature
The conduct of man
Animate object by
Forces of nature
Act of the object
Conduct of man
and in either case by a change in my attitude toward the object.

are dealing only with human conduct, we shall confine our attention to the cases where the interest is affected by such conduct, and exclude the action of the forces of nature. Our attention will be confined to an interest in a human being, and an interest in any object other than a human being where the interest is affected by the conduct of a human being. If, therefore, I have an interest in a horse, and my interest is affected by the horse running away, there is a case outside the discussion.

Interests are protected and unprotected. I may have an interest, for instance, if I am an artist, in the picture of a great master hanging in the Louvre, and if that picture is destroyed by fire or carried off by an invading enemy, my interest is affected; whereas, my neighbor, who is not an artist, will have no interest in the picture and be entirely unconcerned by its removal or destruction. In like manner, I have an interest in my neighbor, which interest is affected, according to my attitude toward that neighbor, by his death or by hearing some spicy piece of scandal about him or his wife. These are instances of unprotected interests, that is, interests which may be affected without my being able to obtain any redress either through my own efforts or through the assistance of external aid. An interest is protected when I am able to set in motion some external means of determining the conduct which is affecting the interest.

Two or more persons may have the same interest—a joint or collective interest, and a body of individuals may have an interest in the body as such or in some outside object. A classification of the interests which exist in the modern world lies outside the scope of this discussion. The enumeration we have made will be found sufficient to indicate the scope of the treatise which will relate to the conduct and interests of certain bodies of individuals, to wit, independent states.

The conduct of a human being will be determined by an infinite number of factors which, however, may be arranged under two headings: (A) internal, those arising from the characteristic of man himself as a human being; (B) external, those proceeding from objects external to the particular human being whose conduct is affected. It is important clearly to distinguish these factors, because conduct is one thing, and the factors influ-

encing conduct are something else, and much confusion prevails because of the failure to keep the distinction clearly in mind.[4]

The conduct of man as a rational animal is determined very largely by factors to be learned only by examination of the nature of man himself. The discussion of the internal characteristics of man is unnecessary to the discussion and may be left to the branches of learning devoted to those subjects. We start with the assumption that conduct is determined in many instances by impulses inherent in man, and proceed upon the following rough classification of those impulses: (A) Instinct. (B) Reason. (C) Habit. (D) Attitude towards self-interest. (E) Attitude toward interest of others. These will be considered in the order named. The importance of this classification of internal factors lies in the fact that it helps to make clear the distinction between external and internal factors, a distinction which is of vital importance to the further understanding of the discussion. A large part of the obscurity in the discussion of the nature and meaning of law as it appears in the current writings arises from a failure to keep this distinction clearly in mind.

Instincts are perhaps the most important internal factors determining conduct, but do not require any extended reference. It is sufficiently clear that man is governed in the main by hunger, thirst, sex, desire of life, instinct of self-preservation, etc., and that these are the fundamental underlying motives or impulses of conduct. There is a distinction perhaps between animal desires and instincts which, however, is unnecessary for our purpose. We are only concerned with the external manifestations of these factors. There is, however, one instinct which is of great importance in our discussion, that is, the gregarious instinct. Man is a gregarious animal, and the consequent association with his fellow men produces external factors determining conduct which would be absent if he lived alone.

The human intellect is imitative, disinclined to think, and has a great reverence for the past and that which has already been

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[4] Table showing arrangement of discussion of factors determining conduct:

Internal—inherent in man	External—to man
Instincts	Forces of nature
Reason	Pressure of other men
Habit	Apart from political power
Attitude towards self-interest	From exertion of political power
Attitude towards interest of others	

arranged and accomplished. The ideas of most men are inherited from their ancestors, continue without change during life, and are handed down to posterity with very few alterations, and this is particularly true of ideas relating to the ordinary daily conduct of humanity. A few minds are, from time to time, able to rise above the intellectual level of the mass of men and evolve new ideas. Clear thought is extremely rare, and there is a universal dislike of that which is unknown and a fear of any change, and these characteristics are not very much modified by modern civilization. The minds of the mass of men move so slowly that they cannot keep up with the change in the world, and the vast majority of human beings are a generation behind the vanguard of society. The average man will go where the crowd goes and do what the crowd does without any thought whether that is the best thing to do or not.

The prevailing ideas in a community determine the conduct of the members of that community, and in every mass of men the same idea prevails generally as to conduct upon a particular occasion. There is, therefore, in such bodies of men a uniformity of conduct. This is amply demonstrated by the immense difficulty of teaching the mass of the people sanitation, cleanliness and obedience to the rules of health. The prejudice on these points, which has obtained for generations, is a great obstacle to any improvement. If the change is to the self-interest of the individual, modifications in conduct can be introduced more quickly. Every man's conduct conforms to his ideas and education, with the additional proposition that the mass of men have, under the same circumstances, the same ideas. Uniformity of action springs from identity of idea, which identity of idea in the same community is a fact of human nature.

The conduct of man is, to a large extent, unconscious and individuals adjust themselves to each other in following the conduct to which they were impelled by natural instinct. In the case of the lower animals, such activities are described as habit. The same is true of man. There is a large part of his conduct which is merely habit.[5] Man unconsciously repeats a former act which

[5] "The best illustration of the formation of such habitual courses of action is the mode in which a path is formed across a common. One man crosses the common, in the direction which is suggested either by the purpose he has in view, or by mere accident. If others follow in the same track, which they are likely to do after it has once been trodden, a path is made." Holland, Jurisprudence (10th ed.), 55.

has produced a reaction of pleasure, and by reason of this and of the intellectual tendencies we have referred to, he continues to follow the same conduct. Most of the conduct in a community is largely a matter of habit, and all the members of all communities of men dwell together in surprising amity and accord. The principal conflict is between communities. It seems perfectly clear, from the examples that have been adduced from the life of primitive peoples, that many communities will follow conduct without having any idea of the meaning of their acts. Thus, in some tribes, there will be elaborate marriage ceremonies or sacred dances which no one is able to explain or give any reason for. These instances clearly illustrate the tremendous effect of habit on the conduct of the members of the community.

The attitude of man toward his own interest has a very powerful effect upon conduct and determines to a very large extent the conduct of most individuals in the community. It is only necessary to notice that such attitude exists in the majority of instances, and that always in studying conduct we must recognize the existence of this attitude, and the great effect it will have upon conduct in any particular case. Self-interest is the greatest of all possible interests in the world and is of special importance in international law.

The attitude of an individual toward the interest of others, which is generally one of indifference, may affect his conduct where the individual has a regard for these interests which leads him to respect them. This is what is sometimes referred to as altruistic motives of conduct, and is the least effective of all inward characteristics of man determining conduct. The motives of conduct, as egoism or altruism, are immaterial to us, as we are only concerned with conduct as a fact, whether conduct be good or bad, according to any particular standard.

The conduct of man is also determined by the forces of nature. Among these are climatic and geographic conditions, storms, powers of the sea, etc. No attempt has ever been made to form a jural conception of these influences upon conduct because they are facts which are entirely beyond the control of man. It is of great importance, in order to illustrate or to ascertain the development of various races of man, to know how climatic conditions influence conduct. It is unnecessary, however, for the legal philosopher to burden himself with that investigation. It is sufficient for him to know that conduct is in fact so influenced,

and to separate in his investigation conduct so influenced from conduct influenced by other factors, and then disregard the forces of nature as unnecessary to the discussion. It is true that in the municipal law, the circumstance that conduct has been determined by a force of nature to be other than that which would have been followed without the operation of the force of nature, is ofttimes of importance in ascertaining whether a given individual will or will not be excused from liability by reason of the variation in conduct produced by the operation of the force. In this case, the court is simply recognizing the fact that conduct is in fact so determined.

Man is a gregarious animal and universally lives with his fellowman. The few cases which have occurred of a man living alone and entirely cut off from other men are so rare and abnormal that no account need be taken of them. The gregarious instinct was perhaps developed among animals from the advantage to the individual from a common effort and association. Civilized man owes his present advanced state largely to co-operation, and, without it, modern civilization would perish. It is utterly immaterial to our discussion whether the gregarious instinct of itself has produced a closer association of men or whether economic changes and the advantages and protection of such association developed and accentuated the instinct of gregariousness. This gregariousness brings man into more or less contact with his fellowmen, with the result, therefore, that his conduct will be influenced by pressure from these other men, which will be discussed under the heading of (A) influences apart from political power, and (B) those arising from the exercise of political power.

The pressure of other individuals will vary from the gentle influences of love and friendship and appeals to reason, to intimidation or overpowering force. It is impossible to draw any line and say when the conduct ceases to be determined by the inherent factors and when it begins to be influenced by direct external compulsion. The influence of public opinion may partake of each. In most cases, it will be impossible to tell which of these various factors has a preponderating influence, and they may often work at cross-purposes. We can, however, in theory separate the elements of external compulsion and distinguish between (A) individual compulsion,[6] as the command of a father to his

[6] An individual may determine the conduct of another by intimidation or by the exercise of force. The instances of such action will vary in different communities according to development and civilization.

child, (B) the collective compulsion of a number of individuals, as for instance, the pressure of a labor union which compels a workman to become a member or else lose his job, (C) the political power of the state. The idea is not an external factor determining conduct although the idea may be changed by influences from without. It is not always easy to tell when the idea has been changed by external influence and when it has not.

The political power of the community is a factor of great importance in determining human conduct. First, however, we must inquire what this political power is, and how it is manifested.

The community has already been referred to several times, and there seems to be some little difficulty about the meaning of the word. A community consists of a number of men permanently living together.[7] Man has always lived in a community of some sort, and there has always been some bond by which the members of the community really are, or are conceived to be, bound together.[8] There is some difference of opinion as to what was the original type of this organization, and it is not clear just what was the historical sequence of the various forms which have appeared. It is, however, immaterial, for the purposes in hand, what conclusion may be reached on these points. The jural conception of that organization and its relation to law is the same in any case. It is sufficient for the legal philosopher to know that such institutions have existed and do exist, and to confine his attention to the part they play in the development and conception of law.

The members of a community come into it involuntarily, by

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[7] "A community may be said to be the body of a number of individuals more or less bound together through such common interests as create a constant and manifold intercourse between the single individuals." Oppenheim, Int. L., 2nd ed. (1912), 10. It is unnecessary to add to the definition the statement that they are united by the same interest because they will not live together unless they are so united, and the word "community" clearly conveys the idea of such a union. This definition, furthermore, confines the word to the body of the individuals, whereas, it is conceived, it more properly refers to the individuals taken together collectively, the body as an organization, or the government.

[8] The various bonds which have appeared are as follows:

Blood
  Real
  Artificial—adopted
Tribal
Feudal vassalage
National
Relationship from dwelling together in the same territory.

birth, capture, or being brought in under disability; and voluntarily under some regulation adopted by the community.[9] In ancient times, there was some kind of adoption; in modern times, it is by naturalization. The members of a community may withdraw in the absence of any regulation to the contrary, and self-interest may or may not impel a number to remain. A number of individuals thus bound together have, from the fact of that bond and their common association, a collective force or power which will be of varying strength and exercised in different ways and under different forms, according to the economic development and civilization of the community.

This community of men has always had some organization in all examples of human life which have been discovered to have existed in the past or which exist in the world today. Such organization appears among many of the lower animals, as, for instance, the ant. It may be assumed, therefore, that the instinct and fact of organization is as old, if not older, than man himself. The great mistake made by the legal philosophers is in not having a sufficiently enlarged historical perspective. It is common to suppose that because our written records of law and political institutions only go back a few thousand years, that we have the beginnings of these institutions before our eyes. Man is perhaps a hundred thousand years old, and it is pretty safe to assume that we will have to go back fifty thousand years in the life of the most advanced communities of today to find the beginnings of the legal and political phenomena which most writers assume began within a few thousand years of the Christian era. This organization is an entity existing apart from the community, and the members of the community, and the power exercised by that organization is called "political power."

The power of the community is necessarily exercised by individuals. Man naturally tends to follow a leader and be governed by somebody, and some men are natural leaders and able to exert authority over others. Such persons will inevitably come to the front and assume leadership, whether as a tribal chief, a

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[9] Membership in a Community.
Involuntary
By birth
By captivity
By being brought in under disability.
Voluntary—by admission into the community
Fiction of adoption, ancient,
Naturalization, modern.

king, a statesman or a political boss, and will work the mechanism of the political institution in whatever form it may occur. Their personal authority and power will vary according to the circumstances of the case. Modern development of political institutions has tended to diminish the power of individual leaders and transfer that power by some means or other to the members of the community. The exact relation which a leader bears to the unit he leads, and how much he exercises his own power, and how much the power of the mass, are matters of profound interest which will bear much analysis, for which space is wanting in this discussion.[10]

In this discussion the word "state" will be used as meaning a community of men existing from within, and exerting its power by its own inherent force.[11] The word "state" is used in several different senses by the writers, to which, however, it is unnecessary to refer.[12] A community, therefore, may or may not be a state, and the government of the state is a political organization, distinct from the state, and which may be changed or become extinct without affecting the life of the state which may be regarded as a living organism. A corporation is an organization but derives its powers and authority to organize from a superior power. It is therefore not a state. So, also, a municipality, as it exists in England and America, is a corporation, exercising its power by grant from the state. It is therefore not a state. Many volumes have been written on the nature and definition of the state, but this simple conception is sufficient for the present discussion.

The political power of the state determines conduct in several ways, which will be through the exercise of the several branches of executive, judicial or legislative organs of the government.[13]

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[10] The following suggestion seems to be in point: Let the power of an individual be represented by X. It seems clear that the joint power of two individuals is greater than X plus X, and is perhaps not so great as X multiplied by X. One of the individuals, who is a leader of the other, exercises his own power X, plus the power X of the other individual, plus the increased power gained by the associated effort. It seems probable also that as the increase in the number of individuals in a mass becomes greater, the increase in the massed power increases in proportion.

[11] Oppenheim, Int. L., 2nd ed. (1912), Vol. 1, 9, says that the conception of a community is wider than that of a state; that a state is a community but that every community is not a state.

[12] The size of a state, its organization, its laws, or its customs are immaterial. An ancient village community or a family was just as truly a state as is the Empire of Great Britain today.

[13] It is not necessary, for the purposes of the discussion, to observe this distribution of the state power. It is common to confine the discus-

The exercise of the political power may also be analyzed from another point of view, as follows: the power may be exercised (A) by prescribing a rule of conduct for the future, and affixing some penalty for its disobedience, (B) by prescribing a rule of conduct without imposing any penalty, (C) by affording redress for damage to interests without prescribing any rule to be followed by the organ of government affording such redress, in which case the organ of government may attempt to follow some rule in affording redress or may act without any such attempt.

The state has very little power in barbaric communities, and there are no courts or legislatures. The life of the people flows in accustomed channels; needs are few and easily satisfied; there is little personal property and almost no thefts. Men are nearly of equal strength, and this equality of personal force prevents any undue exploitation of one by another. When, however, civilization increases, and wealth and material prosperity appear in a community, great inequality is created between the various individual members, inequality of physical strength and of mental power, and as a result, the weak are preyed upon by the strong. As this situation unfolds itself, there is an increasing need of the state exerting its power in order to protect men from each other, consequently developing civilization sees a development of courts, of legislatures and of the exercise of the power of the state. In modern civilization, furthermore, not only is there greater opportunity for the strong to plunder the weak, but the rewards of such plunder are greater, and the temptation correspondingly increased. As the old Hebrew proverb runs, if the state did not exist, the strong would destroy the weak. Failure of the power of the state is still with us. Early communities were powerless to enforce rules now easily enforced, and the rules that we cannot now enforce may be easily enforced in the future. The state finally curbed the robber baron and violent men of the community, and such crimes are negligible in a modern civilized community. We now have crimes of fraud prevailing, and the state is struggling as desperately to curb the promoters of fraud

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sion to the judicial power of the state, which, it is submitted, overlooks the fact that the executive may often afford redress for damage to an interest. The distinction is only necessary when we come to deal with the analysis of the various rules prevailing within a state, which is the applied philosophy of the municipal law and entirely outside the scope of our present discussion.

as the princes of the middle ages did to break the power of the robber baron.[14]

Conduct as a fact has been defined and the external factors determining conduct, which are also facts, have been pointed out. What conclusion is to be reached when we consider them together? It will be assumed that the conception of conduct as determined by external factors is a jural conception, and the suspicion will be entertained that by analyzing that conception we shall be able to shed some light on the meaning and nature of law. It is first necessary to say a few more words about conduct. Conduct is to be distinguished from the description of the conduct, as conduct may take place without anyone ever describing it, and we may describe conduct which never has and probably never will occur. Conduct is past, present or future, and the description will vary in tense according to which it is applied, with this distinction: past and present conduct will be described as actual facts while the description of future conduct will be of a fact which may or may not occur as described.

The factors influencing conduct result in more or less continuous conduct in some semblance of order, but the description of that conduct in terms of order, and the factors, are to be clearly distinguished. A rule of conduct is therefore simply the

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[14] The following table sets out the various factors determining human conduct:

Factors inherent in man
- Instinct
- Reason
- Habit
- Attitude toward self-interest
- Attitude toward interest of others

Factors external to man
- Facts and forces of nature
- Factors proceeding from other men and present because of the gregariousness of man

Apart from political power
- Parental
- Marital
- Master and servant
- Force and intimidation from another individual
- Societies and bodies of men
- Ideas in the community, public opinion
- Custom
- Ethics

From political power

Executive	In any one or all of which	(A) Prescribing a rule of conduct and affixing a penalty
Judicial		(B) Prescribing a rule without a penalty
Legislative		(C) Affording redress without prescribing any rule.

expression of a conscious mental effort to describe conduct historically, in the present tense, or as a source of information to members of the community of the conduct to be followed in the future. A rule of conduct is therefore a mental abstraction and cannot exist apart from reason. The description of future conduct may incorporate the idea of some external factor determining the conduct, or it may not. The conception of conduct will differ according to the point of view. If we look at conduct which has taken place in the past, we describe it in terms of history or habit. If we look at the actions of animals, we describe the action which they ordinarily follow as the habit of the animal. The same is true of man, only instead of using the word "habit" we use the word "conduct." A rule of conduct is nothing but a description of conduct which may be phrased either in the form of a description of past or present conduct, as all men turn to the right when meeting a traveler on the highway, or in terms of the future, in which case the phrase will be—all men shall or will turn to the right.

The principal operation of the external factors determining conduct is to protect interests, and the protection of interests by these factors necessarily determines the conduct affecting the interest. How then are interests protected? My interest in an object may be affected by the conduct of another person, by a change in the object itself, and when that object is a person, the conduct of the object. My attitude toward such conduct will vary according to whether the effect produced is contrary to my liking. If the effect is sufficiently unpleasant, I will be filled with revenge or be moved to seek some redress either by way of compensation or by way of an attempt to restrain a repetition of the conduct. The extent to which I may have such redress will be determined by the ideas prevailing in the community as to the conduct which should be pursued under such circumstances, and those ideas will very largely correspond to the habitual conduct which has in fact been followed in the past, irrespective of what the origin of that conduct may be, and will be determined largely by what the other members of the community feel as to similar conduct affecting a like interest in themselves. The community will therefore regard redress as suitable on some occasions and as inappropriate in others. There will be a difference also in the amount and kind of redress under different circumstances. Conduct, therefore, affecting interests, leads to personal disputes, and

the community will, from time to time, interest itself in settling such disputes.

There are three kinds of redress[15] which, in the historical order in which they are generally supposed to have appeared, are as follows: (A) Self-help, which is the action taken by the person aggrieved, of his own volition, to secure revenge or satisfaction. (B) Arbitration, which is where the parties voluntarily submit the dispute to a third person or persons for decision. (C) Power of state, which is where the state by its proper official, generally judicial, pronounces judgment and enforces the order made against the parties by the power of the state. The latter two exhibit the common element of a third party determining the dispute; in arbitration, however, the submission to the judgment is voluntary, whereas, in the case of a state officer, the process is compulsory and enforced by the state. It seems reasonable to suppose that self-help was first in order of development, arbitration next, and the power of the state last. There is, however, no absolute evidence, and we can only make a conjecture as to the historical order.

A number of different definitions of law have been collected in the note, which do not by any means include all which have been propounded.[16] A sufficient number have been referred to, however, to indicate the general trend of opinion and demonstrate that the failure of the definitions arises from an insufficient analysis of the facts and an attempt to lay stress on one or more external factors to the exclusion of others. None of these definitions brings out the abstract nature of law as a pure mental conception, and all overlook the variety of factors which determine conduct.[17] The popular view, and that of English-speaking

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[15] Redress contemplates not only compensation for damage, but also prevention.

[16] It is to be observed that there is an obscurity arising from the fact that in French and German there is no word corresponding to the English word "law." *Jus, droit* and *recht* equal right as well as law, so that the definitions of continental writers are to be used with great caution.

See Manning, Int. L., 2nd ed. Amos. (1875) 1; Westlake, Int. L., 2nd ed. (1910) 9; Wheaton, Elements, Dana's ed. (1866) 18, 19.

[17] The definitions may be grouped as follows:

(*a*) Definitions emphasizing the external power of the state, and excluding from the meaning conduct as determined by any other factor: "We may then say that law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power." Oppenheim, Int. L., 2nd ed. (1912) 8.

"Municipal law . . . is properly defined to be a rule of civil con-

judges and lawyers, is that law describes the power of the state in determining conduct, which power may be exercised by prescribing a rule, with or without a sanction, or by affording redress according to the external factors operating in the community independently of any action by the legislature. This view, however, appears inaccurate upon careful analysis. We have two elements, the description of the conduct and the power of the state through various organizations enforcing the conduct so de-

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duct prescribed by the supreme power in a state, commanding which is right and prohibiting what is wrong." Blackstone, Comm., Introduction, Sec. II.

(*b*) Definitions emphasizing the conception of order in fact, in conduct or in the operations of nature, and ignoring the external factors determining such conduct: "Laws in their most general significance are the necessary relations arising from the nature of things." Montesquieu, Spirit of Laws, Book I, 1.

"Law in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational." Blackstone, Comm., Introduction, Sec. II.

"But laws, in their more confined sense . . . denote the rules not of action in general but of human action or conduct." Ibid.

(*c*) Definitions bringing out the thought that a number of external factors are involved in the definition of law but failing accurately to note and distinguish them:

"The most important outcome was embodied in Savigny's declaration that law is not the creation of the will of individuals, but the outcome of the consciousness of the people, like their social history or their language. . . . The world is beginning to understand that law is neither the command of an outside sovereign, nor a collection of abstract principles in force by the nature of things for all ages, but the expression for the time being of the dominant force of the community." Hannis Taylor, "The Science of Jurisprudence," 22 Harv. Law Rev. 243, 246.

Kant's definition of law as "a totality of the conditions under which the free will of one man can be united with the free will of another in accordance with the general law of freedom," does not define law, but describes the state of affairs in which the conduct of the members of the community is so adjusted as to give the greatest freedom to each individual consistent with the greatest freedom of all other members of the community, a condition brought about, as he admits, by the observation of law. The proposed definition, therefore, begs the question by using the word attempted to be defined as a term of the definition.

His provisional formula of precision is that "law is the delimitation of what may be done or may not be done without incurring (the risk of) a judgment, attachment, or a special use of force." With the aid of evocation, his definition reads: "law is the delimitation of what man and human groups have the liberty of doing or not doing without incurring (the risk of) a judgment, an attachment, or a special use of force." Henri Levy-Ullman, translated in 12 Amer. J. Int. Law 438. This is merely an abstract formula standing for the conduct which is not determined by the external factors referred to. The words "attachment" and "judgment" refer only to special forms of the exercise of political power, and the term "special use of force" may refer to individual power or to some act of the state, as an arrest by a policeman.

scribed. The power of the state is one element, the description of the conduct another. These elements may be separated, but the two are generally both designated by the term law. If we look at the conduct solely through the description, we include all conduct, past and present, which may be reduced to terms of order. If we consider solely the power of the state, we consider only future conduct and endeavor to state what the conduct may be expected to be.

Law as applied to human conduct in its broadest signification which will include all possible meanings, is the jural conception of human conduct as influenced by external factors other than forces of nature. This definition extends to the conduct in fact and to the external factors influencing that conduct, and to the description of the conduct. This conception may be of (A) past, (B) present, (C) future conduct, and will be subject to slight variations accordingly.

(A) Past. The conduct which has in fact occurred in the past involves the question of what was the conduct and what external factors in fact determined that conduct. (B) Present. The conduct which is taking place at present involves the question—what is that conduct which is now taking place, and what factors are determining it? (C) Future. The future conduct involves the question—what conduct will take place in the future, and what factors will determine it? In answering this question, we have still greater uncertainty and are necessarily faced by the variation produced by the presence of the internal factors determining conduct, which will produce a disturbance of the effect of the external factors. In (A) and (B) there is a certainty as to both. The uncertainty as to factors arises entirely from the difficulty in fact of separating the influence of each factor from that of the others.

What is the jural conception of conduct, and how is it the pure mental conception? Conduct is a fact and when directly observed appears to us as a fact, and the mental impress of that fact, whatever the metaphysicians call it, corresponds to the fact and need not for the purposes of the present discussion be differentiated from it. Conduct directly observed is motion consisting of a number of continuous acts, just as the spectacle of a galloping horse is a fact which may be analyzed into several different elements. Conduct, therefore, may be analyzed, and a number of different instances of conduct of an individual or a

number of individuals may be grouped together, each group forming a larger fact or set of facts. There comes a time in this process of grouping when the mind is unable directly to grasp the multitude of facts assembled and must resort to some abstract conception which will serve to represent the aggregate of them. We may directly observe two or three objects as a whole, but as the number of the objects increases, our capacity of direct apprehension will decrease according to the size of the objects and our facilities for observation. A thousand ants may be directly observed when 100,000 battleships will be beyond mental comprehension. The whole aggregate of human conduct, even in any given community, presents a mass of fact beyond possible enumeration and comprehension.

Suppose a three-masted ship is being driven through the water by the wind and by steam power. The wind exerts its pressure on the sails of the masts, which are the external factors, and the engine and the helmsman are the internal factors determining the course of the ship. Now, the course of the ship through the water corresponds to the description of human conduct. After the ship has passed, the line the ship made through the water is merely an imaginary one. So also the course upon which it is about to enter is an imaginary one, but the action of the ship in going through the water is a fact. In the same way an individual's conduct, as we view it in the present, is a fact, but a description of that fact, as it was in the past or as it may be supposed to be in the future, is in each case a purely imaginary conception. We may therefore undertake to define the course of the ship through the water as determined by the sails, engine and pilot, forming a mental picture of the whole process of the ship going through the water. This will correspond to the conception of law, which conception may be colored by the point of view of the person forming the conception, and the principal elements of color in such cases are the external factors determining conduct. Thus, an ethical conception of conduct is a conception of conduct as determined by ethics; a religious conception of conduct is a similar idea as determined by religion. The legal philosopher, however, must take a view of conduct as a whole as determined by all external factors. He cannot confine himself to the external factor of the political power of the state; even the practical ad-

ministration of the law is constantly confronted with the external factors of custom, habit, public opinion, etc.[18]

Law, therefore, is a mental conception and an attempt to combine in one view two facts, conduct and factors determining conduct. Law, therefore, has no motive, no activity, no purpose, is a pure philosophical speculation. The political power of the state is a fact, and the people of the state or the governors of the state may have a motive or purpose in prescribing a certain rule and affixing a sanction. The factor of the political power more nearly expresses the entire conception of law because the legislature may prescribe the conduct and apply the external factor by sanction, whether the conduct so prescribed is already determined by other external factors or not. Cases may occur where the other external factors are stronger than the power of the state, and then we have a case of law which is a dead letter. It is probable after all that the state can by its political power only add a more emphatic and forcible factor to the determination of conduct as already performed in a large part by the prevailing ideas and habits of the community. The most autocratic ruler is frequently unable to exert his power in opposition to the prejudices and habits of the people he governs.

Different suggestions have been made of the relation between the state and the law.[19] Law, in one sense, is a rule of conduct enforced by the power of the state. If this is so, then there can be no law until there is a power of state to enforce it, and if,

[18] The following algebraic formula may assist the reader in comprehending the distinction taken in the text. Let c = present conduct, c^1 = past conduct, c^2 = future conduct, d = description of the conduct, f^1 = external factors arising from presence of other men, apart from political power of the state, f^2 = external factor of political power.

Expanding these symbols in the form of equations and letting the letter "x" represent law, we find the following propositions: according to definition (a) in note 17, *supra*, $f^2 = x$; according to definition (b) in the note, $c+c^1+c^2+d=x$; according to definition (c) in the note, $f^1+f^2=x$. It is obvious, therefore, that the letter "x" has different values in the different equations. The definition proposed in the text appears in the form of the following equation: $c^1+c+c^2+f^1+f^2+d=x$, which includes all the other equations.

[19] "Originally law was not a product of the State but the State was a product of law. The right of the State to make law is based upon the rule of law that the State is competent to make law." Oppenheim, Int. L., 2nd ed. (1912), 14n[1]. "Law creates the state and the state creates law by a common and mutual impulse; the two are born at an instant, are inseparable through life and must die together." Beale, J. H., Conflict of Laws, Vol. 1, §101 (1916). "The state is an historical and political fact, the creator rather than a creature of law." Hershey, Int. L., (1912) 115, and authorities cited.

therefore, the law depends on the state, it is impossible to say that the state is a product of that which depends upon it. If, however, we define law as being merely the description of the habitual conduct of the members of the community followed by them without the exertion of the power of the state, then the exertion of that power is independent of and has no connection with it, and is not a necessary element in law but an element which may or may not be present.

When it is said that an individual adjusts his conduct in conformity with a rule of conduct, we say something that rarely happens. He pursues his conduct according to his interest and instinct and the habits of the community around him, and is governed more or less by fear of redress. If it so happens that his conduct in connection with the conduct of other individuals conforms to a certain rule, this is a conception of which he is unaware. The average individual is no more conscious of the elaborate jural conceptions of the philosopher than the ant is of the observations of the learned scientist who is watching his movements. If a rule describes conduct which individuals follow from an inward conviction of right, even though that conviction is shared by the majority of the members of the community who act upon the same impulse, the motive is inward. In such cases the individuals follow the rule from what may be termed inward compulsion or motive. Certain individuals, however, may not have the same ethical ideas as those possessed by the majority, and therefore may be willing to commit a breach of the rule of conduct in question, but dread of the moral condemnation of the other members of the community will compel such an one to obey the rule. This individual acts from external compulsion, to wit, public opinion. This same rule of conduct may therefore appear to some individuals as merely descriptive of conduct always voluntarily followed without compulsion, and may appear to another individual as a hateful restriction, only to be complied with because of external compulsion, which may be either the opinion of the fellow members of the community or the political power of the state. A rule enforced by political authority frequently has the same aspect. People of highly developed ethical ideas may pass their entire life without ever coming actually in contact with the state or the agents of the state, and be in entire ignorance of hundreds of criminal statutes which are complied with by them as a matter of second nature. It is obvious that in such case even

rules have no imperative aspect to such a person. Does the rule cease to be a law as to that person? The question whether an imperative sanction by the state is annexed to positive law or common law is easily answered, and if that be the test of law, the test applies irrespective of the attitude of any individual mind toward it. If we reject any such formal descriptive quality, then we find that the existence or non-existence of any external compulsion of public opinion differs according to the attitude of the individual toward the conduct. If this test is applied, the same rule will be law to some and not looked on as law by others.

A rule of conduct, therefore, is a description of the conduct which individuals follow upon certain occasions, which rule may be voluntarily and unconsciously followed by some members of the community, and followed by others because of external compulsion of public opinion, and by still others solely because of the power of compulsion applied by the state. Furthermore, there may be conduct not habitual with members of the community generally but followed only by a few of advanced ethical development. These differences of conduct are probably more extensive in modern times. If our definition includes, as it does, the external compulsion from the prevailing ideas of the community, which therefore may include ethical and religious conceptions, it seems to follow that law is properly used in referring to the ethical and religious law. We may take a step backward in our perspective view of human society and include all these external forces of compulsion. or we may separate them and consider some to the exclusion of others. The difficulty is that by attempting to include them all, the philosopher is frequently lost in confusion of thought which is produced by the attempt to combine in the same chain of reasoning the conception of what ought to be with the conception of what is, or what is likely to be. This confusion was apparent in the thought of the ancient and medieval world,[20] and it is only in recent years that advanced minds have been able clearly to distinguish these two conceptions.

Law, therefore, is a mental conception, a jural description of conduct, and consequently originates only in the minds of the thinker, just as the description of the habits of the lower animal is a mental conception of the scientist founded on his observation

[20] Ethics and law were confused in early times. Thus, jurisprudence was defined by Ulpian as "the knowledge of things human and divine, the science of the just and the unjust." Dig. 1, 1.10.

of their actions. The history of law and the origin of law is simply a history of the origin and development of the various ideas or jural conceptions of conduct which have been entertained by thinkers from time to time in the past. We must distinguish, therefore, origin of law and origin of conduct. The conduct is a fact, and different conduct appears at different times in different communities. The explanation of those differences in conduct, and why conduct is as it is, is no concern of the legal philosopher, but lies within the attention of the sociologist. It is probable that the conduct of man was, in the first instance, adjusted by instinct to the surroundings in which he found himself. It is further likely that conduct developed gradually and was altered by the pressure of surrounding circumstances. One man, under certain facts, would find it necessary to vary slightly from the conduct which had heretofore obtained. Others, when faced with the same circumstances, would be likely to imitate him, and so a slightly different line of conduct would be established. Gradually this conduct became more and more fixed. As the intellect of man developed, and he began to think more clearly about himself and the surrounding world, he began consciously to observe his conduct and endeavor to explain in some way why he habitually did a certain thing. Conduct became more complex as the community advanced in civilization, and many circumstances would occur so infrequently in the life of a particular individual that he would have no previous personal experience to guide him as to the conduct to be followed. Perhaps his neighbor would be as ignorant. It therefore became necessary that there should be some persons in the community who would be experts on matters of conduct and be able to inform others what should be done. It finally became necessary to have more accurate and permanent knowledge, and with the invention of the means of writing, we have the first appearance of what we call written law.

It is also likely that the period of civilization which we see in the Mesopotamian Valley and in India, antedating perhaps by some thousands of years the Christian era, is, after all, a community in a state of legal development far advanced beyond the state of affairs we are attempting to describe. The people who drew up the Code of Manu must indeed have reached an intellectual development far superior to that of the community in which it is possible to detect the first beginnings of orderly conduct and the germ of rules of conduct. It is apprehended, there-

fore, that it is a mistake to suppose that rules of conduct or law may be assigned as originating within the space of recorded history, or that the Twelve Tables of Rome or the Eastern Codes represent in any way the beginnings of law. At the time these codes were drawn up man must have passed over many centuries of legal development. When we compare the civilization of ancient India even with the development of the bushmen of Australia, we can easily see how far that Indian civilization had progressed from the original condition of man as he first existed in a savage state.

Law, or rather jural conception of conduct, will be divided in three ways, according to which of three predominating elements are selected: (A) One division proceeds by classification of the objects whose conduct is involved. This personal law is law relating to the conduct of persons as determined by their personal status, tribal relationship, etc. Territorial law is law relating to the conduct of all persons within a certain territory. Corporation law is a law relating to the conduct of corporations. International law is law relating to the conduct of independent states. (B) Another classification proceeds by distinguishing the external factors determining the conduct in question. Thus, we have international law, without the factor of external political power; municipal law, with that factor; customary law, without the external factor of political power but determined by custom only; the law of morals, with the external factor of ethical ideas, etc. It sometimes happens, however, that the same conduct is determined by two or more external factors, in which case there will be a difficulty in separating the exact force which each has on the conduct in question. (C) Another division proceeds by classification of the interests, which are or are not protected by the various external factors. Thus, we have the law of real property, the law of crimes, etc. All these divisions cross each other at various points, and no one can be carried out to the exclusion of the others.

When we say that a man has not secured justice or that he has been unjustly treated, we express the general idea in the community as to the redress which the man should have or as to the consequences which, in the opinion of the community, should follow his conduct. He has either had an interest of his damaged, or he has exerted himself and the attendant results of the exertion have not been realized because of some outward agency.

There is a justice secured by the redress afforded by the political power in the community. There is also an idea of justice which does not always correspond to justice enforced by political power but which is entertained by the more advanced members of the community. Acts damaging interests will be differently regarded by the community and some will be considered as furnishing appropriate actions for redress of some kind, irrespective of the kind of redress; this is, calling for some kind of compensation or satisfaction which at first largely appears as individual. Modern ideas of redress are inappropriate for primitive communities largely because of the economic differences which exist. Immediate, personal satisfaction was generally sufficient for rude life. Ideas of justice, therefore, vary from time to time in history and in different communities. There is no universal standard of justice although the notion that there is such standard frequently appears in the writers.

Inequalities of rank and social position, irrespective of the personal capacity of the holders of the superior position were accepted by men of the middle ages as a proper state of things. Changing ideas destroyed the political fabric of Europe under the conception that all men must have an equal opportunity, and the feeble and the weak should not be set over the others by artificial means. The removal of these conditions produced an opportunity for the full play of the natural inequality of man. Now, some philosophers say that this natural inequality of man must be allowed full scope, and every man must accept that inferiority in the social order caused by his own incapacity. If he cannot make a fortune he must be content to be poor; if he has not the brains of a great man, he must be a small one. He cannot complain of the consequences resulting from his own personal equation. A new philosophy has arisen—that all men must have equal status, the weak and the powerful together, and that no man should be permitted, by the exertion of superior force and power, to reap extra consequences in the way of gain. That is, a superior man cannot have the fruits of his superiority to himself but must share them with others so the community can take care of those who are below the average. The task of the statesman is to reconcile these two opposing theories in such manner as will not deprive the superior man of his incentive and thus impede the progress of society, and at the same time, prevent him from mak-

ing too great acquisitions for himself at the expense of the weaker individuals.

The word "right" is used in so many different senses that it has lost all possibility of accurate significance. The word is extensively employed in legal philosophy and in practice, without any regard to accuracy, however, and, as a consequence, generally serves to obscure rather than enlighten. Some of the various meanings of the word "right" have been pointed out by a recent author.[21]

The ambiguity of the word renders it imperative for any writer on law, and particularly a writer on international law, exactly to indicate the sense in which he proposes to use the word and rigidly adhere to his definition. Any failure to do this raises a well merited criticism of obscurity. The author has not found any writer on international law who has clearly indicated the sense in which he uses the word, and most of the writers appear utterly unconscious of any ambiguity in it at all. It is believed that it is entirely possible to discuss any branch of law, and particularly international law, without using the word "right." It will accordingly be discarded from the discussion, although reference will be made from time to time to its use by the writers.

Some of the various conceptions to which the word "right" is applied are as follows: (A) In popular and legal terminology as meaning that it is just. Since there is no absolute standard of justice, its use in this sense really means nothing except as describing that which a particular individual or community thinks is just. (B) As meaning an interest. There is no occasion to employ it in this connection, as the word "interest" sufficiently and more accurately describes the conception. (C) As meaning the potency of obtaining external assistance in protecting an interest, and may be limited to one or more of the external factors, and usually includes the potency of obtaining redress by the external factor of the power of the state. (D) As meaning that

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[21] Roscoe Pound's classification in International Journal of Ethics, October, 1915, referred to and summarized by J. H. Beale, "Conflict of Laws," Vol. 1, §139.

(1) Right in the sense of an interest.

(2) Right as designating the chief means which the law adopts in order to secure interest, that is, capacity of influencing the conduct of others.

(3) Right as a legal power.

(4) Right as a legal privilege.

(5) Right in the popular sense as meaning that which is just.

which is in fact the conduct determined by the external factors in any community, that is, custom of the people, generally a popular usage. (E) As meaning power to act as determined by external factors apart from the inherent power of the individual himself. When the external factor of the political power of the state is in view, the use is purely technical, and under it many different powers are distinguished, as power to make a will, power to appoint, power of an agent, power of attorney, etc. It is used in popular terminology in the same sense with particular reference to the external factor of political power. We have not enumerated all the various uses of the word, and the learned reader will easily be able, upon reflection, to think of other ambiguities.[22]

The object of this article is to form an idea of the definition and nature of law, and as a starting point we assume that law has something to do with human conduct, and exclude from the discussion anything else with which it may have to do, and direct our attention to the acts of human beings which are externally apparent, and to certain factors determining those acts.

I have an interest in an object when I will be affected in any way by any change in the object, whether that change is produced by an outside agency or occurs in the object itself. Nearly all conduct may be referred to some interest, and our attention will be confined to the case where an interest is affected by human conduct, that is, our inquiry is human conduct, and nearly all human conduct affects an interest of some kind. An interest is protected when I am able to set in motion some external means of determining the conduct which is affecting the interest, and unprotected when I am helpless as to such external means. Two or more persons may have the same interest, and a body of individuals may have an interest in the object as such or in some outside objects. International law relates to the interests of certain bodies of men.

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[22] The following quotation indicates the complete obscurity which generally attends the use of the word "right": "In order to protect the individual members of human society from one another, and to make a just society possible, the Creator of man has implanted in his nature certain conceptions which we call rights, to which in every case obligations correspond." Woolsey, Int. L., 6th ed. According to this, the Creator has implanted the conception, but it seems rather remote to say that the notion of right is of divine origin. Furthermore, the members of society are protected from each other by the external factors determining conduct, and these factors, if they have any relation to rights, delimit those rights.

Human conduct will be determined by a number of factors, which may be (A) internal or inherent in man himself, i. e., those proceeding from his characteristics as an animal and a rational being; which may be roughly classified under the headings of (a) instinct, (b) reason, (c) habit, (d) attitude towards self-interest, (e) attitude toward interest of others. (B) External, which are (a) those arising from the forces of nature, (b) those proceeding from other men. The latter are present, because man is a gregarious animal, and will be absent when he is alone. Our attention will be confined to the latter external factors, which are of infinite variety, extending from the gentle pressure of love and friendship to intimidation and force, and from the collective action of a few individuals to the political power of the state.

Man has always lived in a community, and every community has an organization of some kind which exercises the power of that community. Every body of men having an organization exercising such power from within constitutes a state which by exercising its power over its members, to a greater or less extent determines their conduct.

The state may (A) prescribe a rule of conduct for the future and affix some penalty for its disobedience. (B) Prescribe a rule of conduct without imposing any penalty. (C) Afford redress for damage to interests without prescribing any rule to be followed by the organ of government affording such redress, in which case the organ of government may attempt to follow some rule in affording redress or may act without any such attempt. The state had little power in barbaric communities and while that power has increased enormously with the progress of civilization, it seems always to be a little behind the actual needs of the community. The conduct of a human being as thus determined by the action of these various external factors is a fact which in the past and present may be studied as such fact, just as the habits of animals are studied. The conduct is to be distinguished from the description of the conduct and from the factor determining it. A rule of conduct is the expression of a conscious mental effort to describe conduct historically (A) in the present tense, (B) in the future tense as a source of information to the members of the community as to the conduct to be followed in the future. The proper operation of the external factors of conduct we are discussing is to protect interests, which is accomplished by affording to a greater or less extent redress for damage to an interest.

The extent and nature of the redress will vary in different communities and in the same community at different times. The three modes of redress in the historical order in which they are generally supposed to have appeared are (A) self-help, (B) arbitration, (C) power of the state which is generally by judicial process.

Law, as it relates to human conduct may be defined to be the jural conception of human conduct as determined by external factors other than the forces of nature. The definitions current in the books generally emphasize one external factor to the exclusion of the others, or fail to indicate whether the term is applied to the conduct or the factor or both. The only definition, therefore, which will include all possible meanings must include conduct and all factors. The definition must further emphasize that law is a pure conception, a product of pure reason and has no existence in fact unless the definition is narrowed to one only of the factors as is the custom with English speaking judges and practicing lawyers who use the word "law" exclusively to mean the rule of conduct as described by the political power of the state, irrespective of whether it is in fact enforced by that political power or not. This meaning of law is sufficiently clear and corresponds very closely to the popular meaning of the word. The legal philosopher, however, cannot confine himself to this narrow conception, as by so doing he will fail to grasp the external factors other than the power of the state determining conduct, which factors cannot be left out of view by the lawyer, the jurist or the statesman. The controversy over the meaning of the word "law" simply amounts to this: all agree that it embodies the conception of order, but as limited to order in human conduct there is a difference in opinion as to which one or more of the external factors is embraced in the meaning of the word, a difference of opinion so acute that it can only be removed by taking the word as extending to all the external factors.

It is not possible, furthermore, accurately to separate the effect of the various external factors. They may all unite in determining the same conduct or may work at cross purposes. The same external factor may have different aspects of different individuals, some being more impressed by one than another, and many people have a very dim realization of any of these external factors at all. Such persons conform in their conduct, as deter-

mined by their inherent characteristics and instincts, to that determined by the external factors in the community.

Law then has no origin or existence outside the mind of the thinker although conduct and the external factors are facts which have existed and exist in the world today. Law is susceptible of various divisions, and the one which illustrates the subject of our discussion is that between conduct as determined by the external political power of the state and conduct not so determined. The only instance of the latter is that of the conduct of independent states with which international law is concerned. We must furthermore remember that there is no general or absolute standard of justice although many writers make the mistake of supposing that there is. Consequently, any supposed standard of justice is merely an individual opinion or the opinion of a group of individuals, therefore not susceptible of general application. The word "right" has been used in so many different senses that it is entirely useless in any accurate discussion of law, and will therefore be discarded. This can be done quite easily in international law where the words "power" and "interest" will more accurately and with sufficient clearness indicate all the necessary meaning in which the word "right" is used by the writers.

In practice, English-speaking judges and lawyers use the word "right" in a strictly technical significance, which is sufficiently clear to them but when disassociated from the practical atmosphere of the courts has no value whatever.

There is a further ambiguity in this use of the word arising from the circumstance that "droit" and "recht" in French and German must serve for the conception embraced in the word "law" in English, because there is no other word existing in these languages corresponding to the word law.

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